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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-14

LEOLA STUDDERT GISSEL, Executrix of the Estate of JULIUS SCHUTZE GISSEL, and GLOBE INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

C. J. THIBODEAUX and COMPANY and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

(Consolidated Cases)

AMICUS CURIAE MOTION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Of Counsel

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Motion for Leave to File the Accompanying Brief as *Amicus Curiae* in Support of Petition for Writ of Certiorari in the United States Court of Appeals for the Fifth Circuit.

Statement of Interest of *Amicus Curiae*

Francis J. O'Brien of Hill, Rivkins, Carey, Loesberg & O'Brien, New York, New York, a member of the bar of this Court and the attorney for the Association of Ship's

Brokers and Agents (U.S.A.) Inc., respectfully moves this Court for leave to file the accompanying brief *"amicus curiae"*, in support of the writ of certiorari on behalf of the petitioners.

The defendant petitioners herein while acting as steamship agents of the vessel, "S.S. SEA PIONEER", have been held liable for the payment of duty on foreign repairs pursuant to *19 USCA § 257* (presently *19 USCA § 1466 (a)*) on bonds which were posted pursuant to *19 CFR § 4.30* in the amount as provided in *19 CFR § 25.4 (19)*.

The Association of Ship's Brokers and Agents (U.S.A.) Inc., is a corporation which is organized and existing under the laws of the United States, with an office and principal place of business situated at 17 Battery Place, New York, New York. Before the Association became incorporated in 1954 it limited its activities to the organization, regulation and representation of the ship brokers and steamship agents in the Port of New York. However, since that date the Association has become truly national in scope and has opened its roles to all qualified individuals, regardless of their company affiliation. The national effect of the Association is further evidenced by the fact that in August of 1969 the Association became a member of the International Federation of National Associations of Ship Brokers and Agents (F.O.N.A.S.B.A.), whose membership is made up of recognized National Associations of ship brokers and agents with only one such Association from each country. Therefore, it is clear that the Association of Ship's Brokers and Agents (U.S.A.) Inc. are not only involved with the interests of ship brokers and/or steamship agents in the United States but are also, through their participation in F.O.N.A.S.B.A., directly involved with the organization, regulation, and representation of ships brokers and/or steamship agents on an international scale.

In view of the foregoing, we respectfully submit that the accompanying brief will perhaps lay more pointed em-

phasis, than will the immediate parties to this petition, on the decisions made below on the liability of steamship agents for foreign repairs pursuant to *19 USCA § 257* (presently *19 USCA § 1466 (a)*).

For the foregoing reasons it is respectfully prayed that this Honorable Court accept the accompanying brief "*Amicus Curiae*".

Respectfully,

Francis J. O'Brien
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Loesberg & O'Brien
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New York, New York 10038

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(Consolidated Cases)

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF SHIP'S BROKERS AND AGENTS (U.S.A.) INC.

Questions Presented

1. Whether the procedures and forms employed by the Bureau of Customs with regard to liability of a ship's agents blanket term bond (Customs Form 7569) filed pursuant to *19 C.F.R. § 4.30* in the amount as stated in *19 C.F.R. § 25.4*, comply with the language and intent of the statutes and are in accord with the legislative concept of foreign repair duties under *19 U.S.C.A. § 257*?

2. Whether the District Court and the Court of Appeals erred in holding that the language of the customs forms and regulations clearly and unequivocally made defendants liable on their bonds for duty on foreign vessel repairs pursuant to *19 U.S.C.A. § 257*?

Statement of the Case

The controlling facts in this case are not disputed. For the purpose of this brief we adopt petitioner's statement of facts set out in petitioner's application for the writ of certiorari.

ARGUMENT

The writ of certiorari should be granted.

Importance of Question Presented

In determining this petition, the Court need not review factual issues, as the operative facts are not in dispute. What is under review are the decisions of the United States District Court for the Southern District of Texas dated January 19, 1973 (353 F. Supp. 768) and the decision of the United States Court of Appeals for the Fifth Circuit dated April 26, 1974 wherein it was held and later affirmed that a steamship agent who files a blanket term bond, on Customs

Form 7569, is liable for the duty owing on foreign repairs pursuant to *19 U.S.C.A. § 257* (presently *19 U.S.C.A. § 1466 (a)*).

19 U.S.C.A. § 257 provides:

§ 257. Duty on equipments or repair parts for vessels

> "The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; *and if the owner or master of such vessel shall wilfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited.* For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs. R.S. § 3114; Sept. 21, 1922, c. 356, Title IV, § 466, 42 Stat. 957; June 17, 1930, c. 497, Title IV, § 466, 46 Stat. 719."

Although *19 U.S.C.A. § 257 supra* appears to be complete on its face, i.e. it provides for the liability of the *owner and master* for payment of duty on foreign repairs and sets forth the remedy for failure to pay, it has been respondent's position, which has been upheld in the lower courts, that the steamship agent is liable for the payment of duty on a blanket term bond filed on Custom Form 7569 pursuant to *19 C.F.R. 4.14(b)*. In this regard it is

submitted that the position of the respondent's and the decisions of the lower courts are without merit, not only because of the established custom of the trade but also because the wording of the various statutes involved, i.e. *19 C.F.R. 4.14(b)* and *19 C.F.R. 4.30*, appear to support the contentions of the petitioners herein.

Both *19 C.F.R. 4.14(b)* and *19 C.F.R. § 4.30* provide for the filing of Customs Form 7569, however it cannot be too heavily stressed that the wording of both sections is of prime importance.

19 C.F.R. 4.14 (b) provides in part:

> "§ 4.14 Equipment and Repairs to American Vessels
>
> (b) Entry on customs Form 7535 shall be made for such equipment or repairs. Such entry shall show the last sailing date from each country at which repairs were made on the particular voyage. *Estimated duties shall be deposited or a bond on customs Form 7567 or 7569 given therefor before the vessel shall be allowed clearance, . . .*

19 C.F.R. 4.30 provides in part:

> Landing and Delivery of Cargo
>
> "4.30 Permits and Special Licenses for Unlading and Lading.
>
> (a) . . . no passengers, cargo, baggage, or other article shall be unladen from a vessel which arrives directly or indirectly from any port or place outside the Customs territory of the United States . . . until the district director shall have issued a permit or special license on Customs Form 3171.
>
> . . . . . .
>
> (b) The request for a permit or a special license shall not be approved . . . unless . . . the required cash deposit or bond, on Customs Form 7567 or 7569, has been received."

In the case at bar the petitioners filed the required bond pursuant to *19 C.F.R. § 4.30 (c) supra* on January 14, 1965 (See Petitioners Exhibit A p. 61) before the cargo arrived in the United States, and on October 11, 1965 filed the required Customs Form 3171, as required by *19 C.F.R. § 4.30 supra*, so that the cargo aboard the S.S. SEA PIONEER could be unloaded upon arrival at a U.S. port (see petitioners Exhibit B p. 62). Subsequently, on October 14, 1965 the Master, pursuant to *19 C.F.R. § 4.14 (b)*, filed Customs Form 7535 which estimated the duties owed by the S.S. SEA PIONEER for foreign repairs (see petitioners Exhibit C p. 63) however no additional bond or cash deposit was made before the vessel was allowed clearance. It is the respondent's contention, which was upheld by the lower courts, that since the bond which was required by both *19 C.F.R. § 4.14 (b) supra* and *19 C.F.R. § 4.30 supra* was on Custom Form 7569 that the steamship agent is liable under both sections for money's due the United States. In our opinion, such an interpretation of *19 C.F.R. § 4.14 (b) supra* and *19 C.F.R. § 4.30 supra* is unwarranted and completely disregards the express language of both sections.

While it is true that both *19 C.F.R. § 4.14 (b)* and *§ 4.30 supra* require either a cash deposit or the posting of a blanket term bonds on Customs Form 7569, it is clear that the provisions of *19 C.F.R. § 4.30 supra* require the posting of a bond on Customs Form 7569 *before* a permit or special license under Customs Form 3171 will issue while the provisions of *19 C.F.R. § 4.14 (b) supra* clearly implies that there is an entry on Customs Form 7535 *and then* the estimated duties are deposited or bond posted *before the vessel shall be allowed clearance.*

Since the blanket term bond on Customs Form 7569 was posted, by the petitioners herein, almost ten months before the filing of the estimated duty for foreign repairs on Customs Form 7535 and further since the language of *19*

C.F.R. § 4.14(b) supra clearly implies that the posting of the bond on Customs Form 7569 shall be after the amount of duty on foreign repairs is estimated, it seems apparent that the blanket term bonds on Customs Form 7569 was filed not pursuant to the requirements of *19 C.F.R. § 4.14(b) supra* but rather in accordance with the requirements of *19 C.F.R. § 4.30 supra.*

Another factor which supports the position of the petitioners herein is that the Master of the S.S. SEA PIONEER in complying with *19 C.F.R. § 4.14(b)* estimated the amount of duty on Customs Form 7535 to be $14,351.50, however instead of requiring a bond for the full amount Customs allowed the steamship agents to post a bond on Customs Form 7569 for only $10,000.00. This fact would further tend to support the contentions of the petitioners herein that their liability is limited to the provisions of *19 C.F.R. § 4.30,* which by its terms deals only with the duty on cargo loaded and/or discharged and has no application to duties on repairs to American vessels in foreign yards.

Conclusion

It is submitted that the decision of the District Court for the Southern District of Texas dated January 19, 1973 (353 F. Supp. 768) and the decision of the Fifth Circuit dated April 26, 1974 were rendered without regard to the express provisions of *19 C.F.R. § 4.30* and *19 C.F.R. § 4.14 (b).* Both statutes require the posting of a bond on Customs Form 7569, however the purpose and objective of each statute is unrelated and distinct i.e. *19 C.F.R. § 4.30* concerns itself with duties on cargoes and *19 C.F.R. § 4.14 (b)* deals with duties owing the United States for repairs made on American vessels in foreign yards. Since the bond in the case at bar was posted pursuant to *19 C.F.R. § 4.30* to cover duties on cargoes loaded and/or unloaded in the United States, it would be inequitable to impose

further obligations on a party pursuant to another provision (*19 C.F.R. § 4.14 (b)*) of which the party had no notice and did not assume any obligation.

In view of the far reaching effect of this matter upon the numerous steamship agents in the United States, it is respectfully submitted that this matter is ripe for determination by this Court.

Dated: New York, New York, this 11th day of October, 1974.

Respectfully submitted,

By: FRANCIS J. O'BRIEN

Attorney for Amicus Curiae
Association of Ship's Brokers
and Agents (U.S.A.) Inc.

ROBERT E. DALEY
HILL, RIVKINS, CAREY, LOESBERG
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Of Counsel

Certificate of Service.

This is to certify that on the 11th day of October, 1974 copies of the above Application to Appear as Amicus Curiae and Brief in support thereof have been forwarded to:

Robert M. Julian, Attorney for Petitioners, C. J. Thibodeaux and Company, and Travelers Indemnity Company, whose consent to file this application has been obtained at his office and post office address, 1314 Texas Avenue, Houston, Texas 77002.

Alan S. Dale, Attorney for Petitioners, Leola Studdert Gissel, Executrix of the Estate of Julius Schutze Gissel, and Globe Indemnity Company, whose consent to file this application has been obtained at his office and post office address, Mellie Esperson Building, Houston, Texas 77002.

Mr. Lawrence L. Ledebur, Attorney for Respondent, United States of America, whose consent has not been obtained, at his office and post office address, Admiralty and Shipping Section, Department of Justice, Washington, D. C. 20530.

Mr. Jack Shepherd, Attorney for Respondent, United States of America, whose consent has not been obtained, at his office and post office address, Assistant United States Attorney, P. O. Box 61129, Houston, Texas 77061.

FRANCIS J. O'BRIEN